93-902

CASE NO. _____

Supreme Court, U.S.
FILED
NOV 18 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES
OF
AMERICA

TERM: OCTOBER 1993

CALVIN R. SMITH,

Petitioner,

v.

MALLARD & MINOR, a partnership,
WILLIAM D. MALLARD, JR.,
H. DEAN MINOR, and
ROBERT C. D. MCDONALD

Respondents

Petition for Writ of Certiorari to the
State Court of DeKalb County, Georgia

PETITION FOR WRIT OF CERTIORARI

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1-404/972-8465

48 pp

QUESTIONS FOR REVIEW-RULE 14.1(a)

1. Did the Trial Court violate Petitioner's XIV Amendment Constitutional Rights of the United States by enforcing State Statutes so as to **"abridge the privileges and immunities of Petitioner"**?

2. Did the Trial Judge exceed his Authority and violate Petitioner's XIV Amendment Constitutional Rights of the United States by denying him **"Due Process of Law"**?

3. Did the Judicial System of the State of Georgia show partiality and bias toward the Respondents and prejudice against the Petitioner so as to deny him **"Equal Protection of the Law"**?

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IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

CALVIN R. SMITH,	)	STATE OF GEORGIA
Petitioner, pro se	)	STATE COURT NO. 92A 61423-1
v.	)	
MALLARD & MINOR, a partnership, WILLIAM D. MALLARD, JR., H. DEAN MINOR, and ROBERT C. D. MCDONALD	)	COURT OF APPEALS NO. A93A0864
	)	SUPREME COURT NO. S93C1428
Respondents	)	

PETITION FOR WRIT OF CERTIORARI

COME NOW Petitioner, CALVIN R. SMITH, pursuant to Rule 10(b) and 10(c) of the United States Supreme Court and Rule 16(b) of the Georgia State Court of Appeals and by way of this **Petition For a Writ of Certiorari** respectfully request the **SUPREME COURT OF THE UNITED STATES** to review the Trial Court's **Order** dismissing Petitioner's

Complaint against Respondents for Malpractice, Negligence and Breach of Contract.

I. PARTIES TO THE PROCEEDINGS
RULE 14.1(b)

All Parties to this proceeding appear in the caption of this case. However, because the constitutionality of Georgia Statutes O.C.G.A. Section 9-11-9.1 and O.C.G.A. Section 9-11-12(b)6 are drawn into question, Rule 29.4(c) of the United States Supreme Court dictate that 28 U.S.C. Section 2403(b) may be applicable.

II. OFFICIAL AND UNOFFICIAL REPORTS
RULE 14.1(d)

Reference **Exhibit "A"** - Court Order of Judge Jack B. Smith, Senior Judge of the State Court of DeKalb County, State of Georgia. Dated December 2, 1992.

Reference **Exhibit "B"** - Court of Appeals of the State of Georgia. Dated May 24, 1993.

Reference **Exhibit "C"** - Court of Appeals of the State of Georgia. Dated June 8, 1993.

Reference **Exhibit "D"** - Supreme Court of the State of Georgia. Dated October 5, 1993

III. JURISDICTION OF THIS COURT
RULE 14.1(e)

This Court has a shared power with the State to protect those rights granted to citizens of the United States under the XIV Amendment of the Constitution of the United States of America.

RULE 14.1(e)(i): Judgment granting dismissal of the complaint was issued on December 2, 1992. Notice of Appeal was given on December 23, 1992 and date of

docketing in the Court of Appeals of Georgia was January 14, 1993.

RULE 14.1(e)(ii): On May 24, 1993, the Court of Appeals of Georgia affirmed, without comment, the Trial Judges order.

On May 28, 1993 a Motion for Reconsideration was filed with the Court of Appeals of Georgia.

On June 8, 1993, the Court of Appeals of Georgia denied the Motion for Reconsideration.

On June 9, 1993 a Notice of Intention to Apply for Certiorari was filed with the Court of Appeals of Georgia. A Writ of Certiorari was filed in the Supreme Court of Georgia with a docketing date of June 24, 1993.

On October 5, 1993, the Supreme Court of Georgia denied the Petition for Certiorari in this case.

RULE 14.1(e)(iv): Enforcement of the Rights of Citizens of the United States granted under the XIV Amendment of the United States Constitution is a shared power between the State and Federal Governments. The State of Georgia has relinquished its shared judicial responsibilities and acquiesced to the Federal Courts to enforce petitioner's rights granted under the XIV Amendment of the Constitution.

Under Rule 10(c) When a state Court has decided an important question of Federal law, or in the case at bar, failed to decide an important question of Federal law, which has not been, but should be, settled by this Court, then a Petition for a writ of certiorari will be granted where there are special and important reasons.

IV. CONSTITUTIONAL PROVISION
RULE 14.1(f)

Under the United States Constitution, Amendment XIV [1868], Section 1. it states that: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

V. STATEMENT OF FACTS
RULE 14.1(g)

1. In May of 1989, Petitioner employed the services of Respondents/ Attorneys Mallard & Minor, William D. Mallard, Jr. and H. Dean Minor to represent him in an EEOC charge of RETALIATION AND

AGE DISCRIMINATION against his employer of 27 years, the Georgia Power Company (Plaintiff Complaint Item 4; Defendant Mallard and Minor's Answer Item 6, p. 2; Plaintiff Objection filed August 27, 1992, Affidavit of Harry Thomas para. 5).

2. On **June 11, 1990**, Respondents Mallard & Minor filed a law suit styled Calvin R. Smith v. Georgia Power Company, Civil Action No. 1:90-cv-1263-HTW in the UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA in Atlanta, Fulton County, Georgia against the Georgia Power Company for **RETALIATION AND AGE DISCRIMINATION** against Petitioner (Plaintiff Complaint Item 5; Defendants Answer Item 1, p. 2).

3. On **April 26, 1991**, Georgia Power Company filed a "Motion for Summary Judgment" (Plaintiff Complaint Item 6 & 7;

Defendants Answer Item 7, p. 2 and Item 8, p. 3).

4. On **August 2, 1991**, Appellees Mallard & Minor responded to the "Motion for Summary Judgment". Based on the local rules of the United States District Court of the Northern District of Georgia, Respondents Mallard & Minor attempted to forever waive any and all rights Appellant had under his claim of Age Discrimination (Plaintiff Complaint, Exhibit K in ref. to Item 9; Notice of Appeal, Exhibit 4). Because of this and other acts of negligence committed by Respondents Mallard & Minor, Petitioner Calvin R. Smith developed and filed his own response to Georgia Power Company's "Motion for Summary Judgment" (Plaintiff Complaint Item 9; Defendants Answer Item 10, p. 3).

5. On **August 22, 1991**, Appellant Smith contacted **Respondent/Attorney Robert**

C. D. **McDonald** to pursue obtaining other legal counsel. Respondent McDonald advertised that he had been practicing Law since 1965 and specialized in Employment Law (Plaintiff Complaint Items 10 & 11; Defendant McDonald's Answer Items 10 & 11).

6. On **August 30, 1991**, Respondent McDonald indicated he would take the case and advised Petitioner to terminate Attorneys Mallard & Minor, William D. Mallard, Jr. and H. Dean Minor (Plaintiff Complaint Item 10).

7. On **September 3, 1991**, following the advise of Respondent McDonald, Petitioner terminated the employment of Attorneys Mallard & Minor, William D. Mallard, Jr. and H. Dean Minor (Plaintiff Complaint Item 10).

8. On **September 18, 1991**, Respondent McDonald advised Petitioner Smith, in part, that, in his opinion (Respondent McDonald's

opinion) he (Petitioner Smith) had a basis for a disparate impact suit against Georgia Power Company (Plaintiff Complaint Exhibit F, p. 3). However, Respondent McDonald Breached his Contract to defend Petitioner's Age Discrimination Claims when he advised Petitioner that, **"In so far as your age claim is concerned, I do not think that the facts were strong enough to even bring suit...and that he (Respondent) would not take the case."** (Plaintiff Complaint Exhibit F, p. 6)

9. On **October 17, 1991**, Petitioner Smith employed the services of **Attorneys Amy Gellins and Pat Nelson** with the law firm of Nelson & Hill, in Athens, Georgia (Plaintiff Complaint Item 14). Attorneys Gellins and Nelson obtained Petitioner's Equal Employment Opportunity Commission records from Respondent H. Dean Minor (Plaintiff Objection "DEFENDANTS HAD

KNOWLEDGE" p. 3 & 4, Affidavit of H. Dean Minor, Exhibit A). Attorney's Gellins and Nelson also advised Petitioner Smith that he had a **DISPARATE IMPACT** claim and employed the services of Martin M. Shapiro, an attorney himself (Plaintiff Complaint, Exhibit I), as an **EXPERT WITNESS** to conduct a statistical analysis (Plaintiff Objection Exhibit B).

10. On **October 29, 1991**, the Expert Witness, Attorney Martin M. Shapiro completed his analysis. (Plaintiff's Complaint, Exhibit "I") Mr. Shapiro's findings were clearly statistically significant and established Petitioner's ***prima facia*** case of discrimination (Plaintiff Complaint Exhibit J; Plaintiff Objection Exhibit B). Attorneys Gellins and Nelson responded to Georgia Power Company's "Motion For Summary Judgment" and subsequently the case was settled out of

court, on March 4, 1992 (Plaintiff Complaint Item 14).

11. Petitioner had a contract with and paid approximately $20,000 to Respondents Mallard and Minor to represent, in part, Petitioner's claims of Age Discrimination. Petitioner paid Respondent Robert C. D. McDonald $1,150 only to be left without legal representation at a critical point in his law suit (Plaintiff Complaint Item 15; Defendant Mallard and Minor's Answer Item 14; Defendant McDonald's Answer Item 15).

12. On **July 13, 1992**, Petitioner filed a "**COMPLAINT**" in the **STATE COURT OF DEKALB COUNTY** against Respondents Mallard & Minor, William D. Mallard, Jr., H. Dean Minor and Robert C. D. McDonald. Petitioner charged the Respondents with **Legal Malpractice, Negligence and Breach of Contract** (Plaintiff Complaint Item 17).

13. On **August 13, 1992**, Respondents Mallard & Minor, William D. Mallard, Jr. and H. Dean Minor filed their **ANSWER** to Petitioner Smith's complaint and filed a **MOTION TO DISMISS** Petitioner's Complaint on the grounds that plaintiff has failed to state a claim upon which relief may be granted and that Petitioner had failed to contemporaneously submit with his Complaint the requisite accompanying affidavit pursuant to O.C.G.A. Section 9-11-9.1, from a legal expert providing factual support for Plaintiff's allegations of professional malpractice reportedly committed by defendants.

14. On **August 14, 1992**, Respondent Robert C. D. McDonald filed his **ANSWER** to Appellant's complaint and filed a **MOTION TO DISMISS** Petitioner's Complaint **pursuant to O.C.G.A. Section 9-11-12(b)6.** Respondent McDonald's motion indicates that Petitioner

alleged, "...a **Breach of Contract and legal malpractice.**" Respondent McDonald contended that **the malpractice claims** should be dismissed in accordance with O.C.G.A. Section 9-11-9.1 which requires Plaintiff to submit an affidavit of an expert witness competent to testify.

15. In Respondent McDonald's Motion to Dismiss under O.C.G.A. Section 9-11-12(b)6, Respondent McDonald also stated that the claims of **Breach of Contract** should be dismissed on the grounds that Petitioner failed to state a claim upon which relief could be granted, and accord and satisfaction obviate any claims.

16. On **August 27, 1992**, Petitioner Smith filed "**PLAINTIFF'S OBJECTIONS TO DEFENDANTS MOTION TO DISMISS OF DEFENDANTS MALLARD & MINOR, WILLIAM D. MALLARD, JR. AND H. DEAN MINOR**" to Respondents Mallard and Minor's motion to dismiss. In addition

to citing statute and case law supporting his response, Appellant Smith stated that he had complied with O.C.G.A. Section 9-11-9.1 and that he had submitted an affidavit from an expert witness that supported his claim of age discrimination.

17. On **August 27, 1992**, Petitioner Smith also filed "**PLAINTIFF'S OBJECTIONS TO DEFENDANT MCDONALD'S MOTION TO DISMISS THE COMPLAINT**" to Respondent Robert C. D. McDonald's motion to dismiss". In addition to citing statute and case law supporting his response, Petitioner Smith stated that he had complied with O.C.G.A. Section 9-11-9.1 and had submitted an affidavit from an expert witness supporting his claim of age discrimination.

18. In support of Petitioner's objections to Respondent McDonald's motion to dismiss under O.C.G.A. Section 9-11-12(b)6, **Breach of Contract**, Petitioner

Smith cited statute, case law and produced documented evidence that supported his claim that Respondent McDonald's facts could not have been made in "Good Faith" and those facts which are stated by Respondent McDonald were totally refuted by Petitioner (Plaintiff Objection to McDonald, p. 8).

19. On **September 4, 1992**, Respondents Mallard and Minor filed "THE RESPONSE OF DEFENDANTS MALLARD & MINOR, WILLIAM D. MALLARD, JR. AND H. DEAN MINOR TO THE PLAINTIFF'S OBJECTIONS TO THEIR MOTION TO DISMISS". Respondents contended, in part, that the affidavit of Mr. Shapiro does not demonstrate appropriate qualifications as required under O.C.G.A. 9-11-9.1 such that the affiant could be considered an "expert competent to testify" or render an opinion regarding acts or omissions allegedly

constituting legal malpractice committed by attorneys.

20. On September 9, 1992, Petitioner Smith filed "PLAINTIFF'S RESPONSE TO: THE RESPONSE OF DEFENDANTS MALLARD & MINOR, WILLIAM D. MALLARD, JR. AND H. DEAN MINOR TO THE PLAINTIFF'S OBJECTIONS TO THEIR MOTION TO DISMISS". Petitioner Smith cited statute and case law that supported Mr. Shapiro's affidavit as meeting the requirements of O.C.G.A. Section 9-11-9.1 and contended that Petitioner had complied with O.C.G.A. 9-11-9.1 and had presented an affidavit from a "legal expert competent to testify.

21. On September 25, 1992, Respondents Mallard and Minor filed "THE AMENDED RESPONSE OF DEFENDANTS MALLARD & MINOR, WILLIAM D. MALLARD, JR. AND H. DEAN MINOR TO THE PLAINTIFF'S OBJECTIONS TO THEIR MOTION TO DISMISS" contending that

under O.C.G.A. Section 9-11-9.1, the affidavit filed with a malpractice complaint must show that the affiant is competent to testify as an expert in the case. Respondents stated that Dr. Shapiro's Affidavit was neither submitted nor written in connection with the instant lawsuit and that Dr. Shapiro's affidavit did not specify any act of negligence or omission nor did it state the affiant's opinion as to the reasonableness or skill of the Attorney's conduct.

22. On **September 29, 1992**, Petitioner Smith filed "THE AMENDED RESPONSE OF PLAINTIFF TO DEFENDANTS MALLARD & MINOR, WILLIAM D. MALLARD, JR. AND H. DEAN MINOR'S MOTION TO DISMISS" contending that the affidavit from the expert witness, Mr. Shapiro, was in compliance with the O.C.G.A. Section 9-11-9.1 based on previous court rulings. Petitioner Smith cited

statutes and case law to again support his contention that he had met the requirements under O.C.G.A. Section 9-11-9.1. Petitioner also contended that his complaint was sounded in Negligence and Breach of Contract as well as Legal Malpractice.

23. In determining the standards of practice of Respondents Mallard & Minor, Petitioner also contended that he had the standards of practice of four (4) other attorneys involved in his Employment Discrimination suit to determine the skill ordinarily possessed and exercised by other attorneys, or which other lawyers similarly situated ordinarily possess and exercise (Notice of Appeal, Exhibit 2 presented at oral arguments).

24. On October 9, 1992, oral arguments were presented to the Honorable Jack B. Smith, Judge of the State Court of

DeKalb County. Respondents contended that the Appellant's affidavit from the expert witness was insufficient to meet the requirements of O.C.G.A. Section 9-11-9.1 and that Appellant's complaint was one of "pure and simple Malpractice" and did not sound in "negligence or breach of contract".

25. Petitioner Smith contended that the affidavit from Mr. Shapiro was in compliance with the statute based on previous case law and court rulings. Petitioner also contended that his Complaint **was** sounded in Negligence and Breach of contract as well as Malpractice. In support of his arguments, Plaintiff presented five (5) Exhibits citing mandatory authority in support of his objections to dismissal.

26. On **December 2, 1992**, the Honorable Jack B. Smith, Judge of the State

Court of Dekalb County granted the motion to dismiss Petitioner's Complaint on the grounds that: "Plaintiff contends that such an affidavit is not required as the professional standards for attorney's below which a claim of professional negligence may be maintained is established by the State Bar of Georgia's rules and regulations."

27. On December 23, 1992, Petitioner Smith filed his "NOTICE OF APPEAL" in the State Court of DeKalb County.

28. On January 14, 1993, the case was docketed in the Court of Appeals of the State of Georgia.

29. On May 24, 1993, the Court of Appeals of the State of Georgia affirmed the Trial Courts Order without comment.

30. On May 28, 1993, Petitioner filed a Motion for Reconsideration with the Court of Appeals of the State of Georgia.

31. On June 8, 1993, the Court of Appeals of the State of Georgia denied Petitioner's Motion for Reconsideration without comment.

32. On June 9, 1993, Petitioner filed in the Court of Appeals of the State of Georgia a notice of intention to apply for Certiorari with the Supreme Court of Georgia.

33. On June 25, 1993, Petitioner filed in the Supreme Court of Georgia a Petition for Writ of Certiorari.

34. On October 5, 1993, the Supreme Court of Georgia denied the Petition for Writ of Certiorari without comment.

VI. JUDGMENT OF A STATE COURT RULE 14.1(h)

State Court of County Georgia: In the Trial Court questions were raised as to the sufficiency of the affidavit from a legal expert, which was attached to the

complaint, meeting the requirements of O.C.G.A. Section 9-11-9.1. **Method raised**: through pleadings to the Trial Court and oral arguments from both the Plaintiff and Defendants. The Court failed to rule on or follow Mandatory Authority.

Also, Petitioner raised the question if other attorneys actions satisfied the intent of O.C.G.A. Section 9-11-9.1. **Method raised**: through pleadings to the Trial Court and oral arguments from both the Plaintiff and Defendants. The Court failed to rule on this issue which would have been precedent setting.

Raised the Question if it was proper to dismiss Breach of Contract and Negligence claims, brought under O.C.G.A. Section 9-11-12(b)6, under a motion to dismiss brought under O.C.G.A. Section 9-11-9.1. **Method Raised**: through pleadings to the Trial Court and oral arguments from

both the Plaintiff and Defendant. The Court failed to rule on or follow Mandatory Authority.

Raised the Question of Best Evidence or Primary evidence taking preference over secondary evidence and opinions. **Method Raised**: through pleadings to the Trial Court and oral arguments from the Plaintiff. The Court failed to rule on or follow Mandatory Authority.

Raised the Question of Defendant McDonald perpetrating a Fraud on the Trial Court. **Method Raised**: through pleadings to the Trial Court and oral arguments from the Plaintiff. The Court failed to rule on or follow Mandatory Authority.

Judgment of Dismissal of the Complaint was ordered by the Trial Court on October 2. 1992.

<u>Appeals Court of Georgia:</u> Questions raised included: 1) Whether the Trial

Judge's ruling was based on the pleadings from the parties; 2) Whether the Judge showed bias and favoritism toward the Defendants; 3) Whether the Complaint was sounded in Negligence and Breach of Contract as well as Malpractice; 4) Whether the Trial Judge ruled on Defendant McDonald's motion to dismiss, filed under O.C.G.A. Section 9-11-12(b)6, for Breach of Contract; 5) Whether Plaintiff was denied his rights of Due Process; 6) Whether Defendant McDonald violated the Canons of Ethics of the State Bar of Georgia; and 7) Whether the Trial Judge was partial and should be disqualified from presiding over this case. **Method Raised:** through Enumerated Errors included in Appellant's Brief on Appeal and oral arguments to the court. Judgment of the Trial Court was affirmed by the Court of Appeals of Georgia, without comment, on May 24, 1993.

A Motion for Reconsideration was denied by the Court of Appeals of Georgia on June 8, 1993.

Supreme Court of Georgia: Questions raised included: 1) Whether it was proper for the Trial Judge to ignore the affidavit of the Expert Witness; 2) Whether the Trial Judge properly dismissed claims of Negligence and Breach of Contract; 3) Whether O.C.G.A. Section 9-11-9.1 and O.C.G.A. Section 9-11-12(b)6 were enforced in a way that was repugnant to Petitioner's XIV Amendment Rights; 4) Whether Secondary Evidence was lifted up and ruled on such that it was repugnant to Petitioner's XIV Amendment Rights; 5) Whether the Canons of Ethics, the Code of Judicial Conduct, and Court Rules were ignored or selectively enforced in a way that would be repugnant to Petitioner's XIV Amendment Rights; and 6) Whether facts of the case and evidence

presented were overlooked, provisions of the law and controlling authority has been erroneously construed and misapplied in a way that would be repugnant to Petitioner's XIV Amendment Rights. **Method Raised:** through "Questions for Review" included in Petition for writ of Certiorari to the Supreme Court of Georgia. Petition was denied, without comment, by the Supreme Court of Georgia on October 5, 1993.

VII. ARGUMENT
RULE 14.1(j)

The State of Georgia has the shared power with the Federal Government to enforce those rights of Citizens granted under the XIV Amendment of the United States. Power granted the state is not discretionary, but rather a fiduciary responsibility. Because the constitutionality of Georgia Statutes O.C.G.A. Section 9-11-9.1 and O.C.G.A.

Section 9-11-12(b)6 are drawn into question, Rule 29.4(c) of the United States Supreme Court dictate that 28 U.S.C. Section 2403(b) may be applicable.

A. Law Abridged: The Trial Judge violated Petitioner's Constitutional Rights under the XIV Amendment, Section 1, of the United States Constitution by not ruling on the merits and pleadings of the case put before it, by not following mandatory Authority of the intent of the Legislature that wrote statute O.C.G.A. Section 9-11-9.1 as well as other Court opinions, and by enforcing the Statute so as to abridge the privileges and immunities of Petitioner.

O.C.G.A. Section 9-11-9.1 requires dismissal of a complaint for Malpractice if Plaintiff does not file with the complaint an affidavit from an expert witness, setting forth at least one negligent act or

omission and the factual bases for such claim.

Petitioner submitted such an affidavit and contended that his affidavit met the requirements based on other Court Opinions. The Trial Judge totally ignored Petitioner's affidavit, did not rule on the merits of Petitioners pleadings, and Dismissed the Complaint on grounds that could not possible be relevant to Petitioners pleadings and responses (See Exhibit A Attached).

Also, The Georgia State Court of Appeals has Ruled that it is the intent of O.C.G.A. Section 9-11-9.1 to prevent frivolous or unsuitable actions in which plaintiff cannot prove by expert opinion that a professional standard or practice has been violated and not to dismiss a complaint merely because Defendants asserts they are professionals (**Flowers v. Memorial**

Medical Center, Inc., 198 Ga. app. 651(1991).

Petitioner also, presented evidence to the Court of the standards of practice of other attorneys which successfully completed the Contract that Respondents had breached. It was Petitioners contention that actions of these other Attorneys satisfied the intent of O.C.G.A. Section 9-11-9.1 and that to require additional affidavits would have been an undue burden on the Petitioner and unnecessary and not allowed under the Rules of Evidence which require Primary Evidence be presented over Secondary Evidence. This issue would have set a precedence to this Statute, but was ignored by The State Court of Dekalb County Georgia, the Appeals Court of Georgia, and the Georgia Supreme Court

It is Petitioners contention that the State of Georgia has violated Petitioners

Constitutional Rights through the enforcement of O.C.G.A. Section 9-11-9.1 which was used to abridge Petitioners privileges granted under the XIV Amendment.

B. Due Process of Law: The Trial Judge exceeded his Authority and violated Petitioner's Constitutional Rights under the XIV Amendment, Section 1, of the United States Constitution by dismissing Petitioners claims of Negligence and Breach of Contract under O.C.G.A. Section 9-11-9.1. The Appeals Court and the Supreme Court of Georgia have ruled that where the plaintiff can prove negligence or Breach of Contract, the case is not a professional malpractice case and OCGA Section 9-11-9.1 does not apply to require an expert Affidavit(Rateze v. Preferred Research, 197 Ga. App. 69, 70, 397 S.E.2d 489; Knjep v.

Southern Engineering Co., 260, Ga. 409, 410(3), 395 S.E.2d 809).

Also, the Trial Judge had a motion before it for Dismissal of those claims of Breach of Contract under O.C.G.A. Section 9-11-12(b)6, failure to state a claim upon which relief can be granted. The Trial Judge failed to rule on this motion. Also, Court opinions have ruled that when sufficiency of the complaint is questioned by a motion to dismiss, that this statute requires that it be construed in the light most favorable to plaintiff, with all doubts resolved in his favor (Ghitter v. Edge, 118 Ga. App. 750, 165 S.E.2d 598)1968)).

Petitioner contends that the State of Georgia has violated Petitioner's Constitutional Rights by not ruling on Respondent McDonald's motion to dismiss claims of Negligence and Breach of Contract

brought under O.C.G.A. Section 9-11-12(b)6 and that the State of Georgia has deprived Petitioner of property without due process of the law through the illegal enforcement of O.C.G.A. Section 9-11-9.1.

C. Equal Protection of the law: Through the unconstitutional enforcement of O.C.G.A. Section 9-11-9.1; and failing to enforce O.C.G.A. Section 9-11-12(b)6, Rules under the Canon of Ethics and the Code of Judicial Conduct of the State Bar of Georgia, and Rules of the Appeals Court of Georgia, the State has also denied Petitioner equal protection of the law granted under the XIV Amendment of the Constitution.

Petitioner contends that his Affidavit met the intent of the Statute and complied with Mandatory Authority of other Court

opinions. The Trial Judge did not rule on the merits of the Affidavit.

Petitioner contends that he was **not** given equal protection of the law and was **not** allowed to proceed with his claims of Negligence and Breach of Contract as the Courts have ruled (7 Am.Jur. 2d 259-260, Attorneys at Law 217; Razete v. Preferred Research, Inc., 197 Ga. App. 69, 397 S.E.2d 489 (1990)). Petitioner was denied equal protection of the law because the Trial Judge erred by not ruling on Respondents motion to dismiss petitioners claims of Negligence and Breach of Contract.

The State has also shown partiality for the Respondents, allowing a motion containing false statements of facts to go unnoticed (Directory Rule 6 and 7 of the Canons of Ethics of the State Bar of Georgia) and that the Trial Judge erred by

not taking action (Canon 3, Code of Judicial Conduct, State Bar of Georgia).

Also unnoticed, Under Rule 15(B)(1) of the Court of Appeals of Georgia, Respondent McDonald consented to Statement of Facts contained in Petitioner's Brief to that Court as being ***Prima Facia*** true.

Petitioner was also denied equal protection of the law by the Supreme Court of Georgia, which has jurisdiction over law involving the Constitution of the United States. By denying Petitioner a Writ of Certiorari, the Supreme Court of Georgia relinquished its shared responsibility to protect Petitioner's rights granted under the XIV Amendment of the United States Constitution.

VIII. CONCLUSION

This petition is about a Trial Judge showing Bias toward Attorney's and using

enacted Legislation, wrongfully, to protect them from prosecution.

This petition is about a Judicial system that has shown prejudice against the Petitioner for filing claims against these officers of the court and denying Petitioner his Constitutional rights granted under the XIV Amendment.

This petition is about the inability of the judicial System of Georgia to be impartial in Administering a system of justice, that has shown favoritism toward the Respondents, and has been apathetic against the Petitioner Constitutional rights.

The issue is not whether the Respondents have committed the acts grieved by the Petition, that is for a jury to decide. The issue in this petition is whether the Federal Court will restore

Petitioners rights which have been unjustly taken away by the State Courts of Georgia.

For the State of Georgia to deny Petitioner his rights is an injustice to all of its citizens, and the quality of our judicial system will not improve until those in charge of its Administration are willing to govern themselves - for Justice denied one individual is an injustice to all.

For the above stated reasons, Petitioner prays that this High Court will protect Petitioners rights and Grant this Petition for Writ of Certiorari.

This 15TH day of November, 1993.

By: Calvin R. Smith
CALVIN R. SMITH
Petitioner - *Pro Se*

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Lawrenceville, Georgia 30244
1-404/972-8465

APPENDIX

IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

CALVIN R. SMITH,	)	
Plaintiff	)	
v.	)	CIVIL ACTION FILE NO. 92A-61423-1
MALLARD & MINOR, a partnership, WILLIAM D. MALLARD, JR., H. DEAN MINOR, and ROBERT C. D. MCDONALD	)	
Defendants	)	

O R D E R

The above and foregoing matter is before the Court on its regularly scheduled Motion Calendar. Defendant's Motion to Dismiss based on the failure of Plaintiff to provide an expert affidavit as required by OCGA 9-11-9.1. Plaintiff contends that such an affidavit is not required as the professional standards for attorney's below which a claim of professional negligence may be maintained is established by the

State Bar of Georgia's rules and regulations. Following the argument of the parties, and review of all of the evidence properly before the Court, the Court must and does GRANT the motion. The Court finds that the requirements of 9-11-9.1 have not been met by the evidence offered by Plaintiff in this regard. Plaintiff's case accordingly stands DISMISSED.

So ordered this 2nd day of December 1992.

Signed: Jack B. Smith
Jack B. Smith, Judge
State Court of Dekalb County

NOT TO BE
OFFICIALLY REPORTED

THIRD DIVISION
JOHNSON, BLACKBURN & SMITH, JJ

MAY 24, 1993

In the Court of Appeals of Georgia

A93A0864.

SMITH v. MALLARD & MINOR et al. (B-057)

BLACKBURN, Judge.

The judgment in the instant case is affirmed pursuant to Rule 36 of the Court of Appeals.

Judgment affirmed. Johnson and Smith, JJ., concur.

(No Signature On Document)

EXHIBIT "B"

COURT OF APPEALS

OF THE STATE OF GEORGIA

ATLANTA JUNE 8, 1993

The Honorable Court of Appeals met pursuant to adjournmemt. The following order was passed:

Case No. A93A0864

CALVIN R. SMITH V. MALLARD & MINOR ET AL

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta June 8, 1993.

Clerk.

Signed: Victoria McLaughlin

EXHIBIT "C"

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: October 5, 1993

Calvin R. Smith
581 Cricket Hill Trail
Lawrenceville, Georgia 30244

Case No. S93C1428

CALVIN R. SMITH V. MALLARD & MINOR ET AL.

COURT OF APPEALS CASE NO. A93A0864

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Hunt, P.J., not participating.

Sincerely,

Sherie M. Welch, Clerk

EXHIBIT "D"